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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted]50

CARL S. VICTOR,

Appellee,

v.

LYON ASSOCIATES, INC. and GEORGE W. DRYSDALE,

Defendants,

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this as its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment in question and should exercise such jurisdiction in this case.

Opinions Below

The New York Court of Appeals did not render opinions in the subject case, but affirmed, 21 N.Y. 2d 695 (1967), upon the opinions in the case of *Simpson* v. *Loehmann*, 21 N.Y. 2d 305 (1967), as follows:

In *Victor* v. *Lyon Associates, Inc.*:

> "Order affirmed, with costs, upon the opinion of Fuld, Ch. J., in *Simpson* v. *Loehmann*, decided herewith. Question certified answered in the affirmative. All concur, Keating and Breitel, JJ., on the grounds stated in their respective concurring opinions in *Simpson* v. *Loehmann*, and Bergan, J., on the grounds stated in the concurring opinion by Breitel, J., in *Simpson* v. *Loehmann*, except Burke and Scileppi, JJ. who dissent and vote to reverse on the grounds stated in the dissenting opinion in *Simpson* v. *Loehmann*.

The opinions of the New York Court of Appeals in *Simpson* v. *Loehmann* are contained in Appendix "A". An opinion was entered in this action in Special Term, Part I, Supreme Court, New York County by Justice Thomas Chimera upon rendering the initial order denying the motion to vacate the levy of attachment of the contingent duties of appellant Hanover Insurance Company of New York [Hanover] under its policy of liability insurance. A copy of the opinion of Justice Chimera is also attached as Appendix "B". The judgment of the New York Court of Appeals dated December 29, 1967 from which this appeal is taken is quoted above.

Jurisdiction

This appeal is from a final judgment of the Court of Appeals of the State of New York affirming the decrees of the lower courts denying appellant's motion for an order vacating the levy of attachment of its contingent duties under a policy of liability insurance.

The final judgment appealed from was made and entered on December 29, 1967. Notice of Appeal was filed with the Clerk of the Supreme Court of the State of New York, County of New York, the Court possessed of the record, on January 25, 1968.

The Supreme Court has jurisdiction to review by appeal under the provisions of 28 U.S.C. §1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review on appeal:

Local 438 Construction Laborers' Union v. *Curry,* 371 U.S. 542, 9 L.ed. 2d 514, 83 S. Ct. 531 (1963);

Mercantile National Bank v. *Langdeau,* 371 U.S. 555, 9 L.ed. 2d 523, 83 S. Ct. 520 (1963);

Rosenblatt v. *American Cyanamid Co.,* 15 L.ed. 2d 39, 86 S. Ct. 1 (Mr. Justice Goldberg in Chambers) (1965);

Mills v. *Alabama,* 384 U.S. 214, 16 L.ed. 2d 484, 86 S. Ct. 1434 (1966).

The New York Court of Appeals affirmed the validity under the Constitution of the United States and amendments thereto of Sections 5201(a) and 6202 of the New York Civil Practice Law and Rules, as construed in *Seider* v. *Roth,* 17 N.Y. 2d 111 (1966), and applied in this action to allow the levy of attachment of the appellant insurer's

contingent duties as "debts" to stand. The pertinent sections are:

§6202—"DEBT OR PROPERTY SUBJECT TO ATTACHMENT; PROPER GARNISHEE. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant'."

§5201—"DEBT OR PROPERTY SUBJECT TO ENFORCEMENT; PROPER GARNISHEE.

(a) DEBT AGAINST WHICH A MONEY JUDGMENT MAY BE ENFORCED. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state."

Questions Presented

CPLR §6202 provides that any debt against which a money judgment may be enforced under CPLR §5201 is subject to attachment. CPLR §5201(a) defines such debt as one " . . . which is past due or which is yet to become due, certainly or upon demand of the judgment debtor. . . ." In *Seider* v. *Roth*, 17 N.Y. 2d 111 (1966), the New York Court of Appeals, without consideration of constitutional issues, held that the duties of an insurer to an insured under a liability policy were "debts" under CPLR §5201(a) and were subject to attachment under CPLR §6202. The duties referred to in *Seider* included the duties to investigate, negotiate and, if expedient, settle, to defend and to indemnify. In the present case and in *Simpson* v. *Loehmann, supra* the New York Court of Appeals upheld the application of these CPLR provisions to the duties of an insurer, rejecting the constitutional objections which were submitted to it for the first time. The principal questions presented are:

1. Whether CPLR §§5201(a) and 6202, as construed in *Seider* v. *Roth*, 17 N.Y. 2d 111 (1966) and applied here, are unconstitutional under the due process clause of the Fourteenth Amendment because an attachment made thereunder:

   (a) imposes a jurisdiction which violates traditional notions of fair play and justice under our federal system;

   (b) destroys contractual rights of the insurer and insured and transforms contingent, non-monetary promises contained in a foreign liability insurance policy into absolute debts thereby depriving the insurer of property inequitably;

(c) in reality constitutes a judicially enacted right of direct action against the insurer applicable to foreign causes of action and to foreign policies of insurance in which New York has no substantial interest.

2. Whether CPLR §§5201(a) and 6202 as so construed and applied constitute an unreasonable burden on interstate and foreign commerce.

Statement of the Case

Effective June 17, 1965, the branch office of American International Underwriters Corporation [AIUC] at Naha, Okinawa, issued, as Home-Foreign Manager for Hanover, an automobile liability insurance policy to Lyon Associates, Inc. located at Koza, Okinawa. The policy coverage was limited to the geographical areas of the Ryukyu Islands, Formosa, Japan, Thailand, Korea, South Vietnam and Cambodia. The limit of liability for personal injury to any one person was $20,000. All negotiations for the policy took place in the Far East.

On December 21, 1965, Carl S. Victor allegedly sustained personal injuries at Da Nang, South Vietnam as a result of a collision between a Honda motorcycle driven by him, but owned by one George S. Bishop, and a truck owned by Lyon Associates, Inc.

Victor commenced an action *quasi in rem* against Lyon Associates, Inc. in New York seeking $750,000 in damages by obtaining an order of attachment in the Supreme Court of the State of New York, County of New York and directing the Sheriff of the City of New York to levy attachment on the aforementioned liability policy by serving

copies of the attachment order on AIUC and Hanover. Upon motion in Special Term, the levy was vacated as to AIUC, but sustained as to Hanover. The opinion of Judge Chimera dated December 8, 1966 is appended hereto [Appendix "B"]. The order of Special Term was affirmed by the Appellate Division of the Supreme Court, First Department, 28 AD2d 672, but leave was granted to Hanover to appeal to the New York Court of Appeals, which, by judgment dated December 29, 1967, affirmed the lower courts' decisions.

The only basis for the attachment is the mere fortuity that Hanover does business in New York. The policy was issued in Okinawa; the parties were all present and acting in Vietnam where the accident occurred; and Lyon Associates, Inc., a Maryland corporation, has no connection with New York.

The attachment has bizarre consequences:

1. Under CPLR §320 a general appearance is required in order to contest an action commenced *quasi in rem* on the merits. The ad damnum in the complaint is $750,000, a sum far in excess of the $20,000 policy limit of coverage. In the circumstances, Lyon Associates, Inc., rather than submit itself to unlimited personal liability in this foreign forum, has refused to allow Hanover to appear and contest on the merits. In the circumstances, Hanover cannot appear for Lyon Associates, Inc. to defend on the merits without exposing itself to liability for any judgment in excess of its policy limit of $20,000. Hanover, therefore, has no choice but to default, if the attachment stands, losing all or part of its property, the $20,000 policy limit.

2. Under CPLR §6214(b) the garnishee, Hanover, ". . . is forbidden to . . . pay over or otherwise dispose of

any such debt to any person other than the sheriff or pursuant to an order of the Court." This provision prohibits Hanover from discharging its "duties" under the policy. Therefore, even if Lyon Associates, Inc. consented, Hanover is enjoined from discharging its duty to defend this action or any other action. See, Siegel, Supplementary Practice Commentary, 1967 Cum. Pocket Part, 7B McKinney's Civil Practice Law and Rules §5201, pp. 14, 15.

3. Aside from the "duties" of Hanover to Lyon Associates, Inc. purportedly arising at the time of Victor's accident, the levy is also presumably effective as to all "debts" owing to the insured defendant by the garnishee. This means, if the attachment thesis is to be logically followed, that the duties of Hanover to Lyon Associates, Inc. arising out of the claim of Bishop for damage to his motorcycle in the Victor accident and out of unconnected accidents covered by the subject policy and a Contrators' & Manufacturers' Liability policy also issued to Lyon Associates, Inc. are attached. Pursuing the attachment rationale to its incredible conclusion, Victor can satisfy any judgment he obtains out of these unrelated duties and deprive the other claimants of the protection of Hanover's coverage.

4. The various reciprocal promises, referred to by the New York Court of Appeals as "duties", are contingent in nature. For example, the duty to defend ". . . does not arise until suit against the insured has been commenced . . ." 3 Richards on Insurance, §421, p. 1390 (5th ed., 1952). Under the *Seider* decision, however, the duty can be attached to satisfy the very condition, *i.e.*, commencement of suit, that kept the duty from maturing. More importantly, the duty to indemnify does not arise until there has been an adjudication that the insured is obligated to pay damages. This contingency and the con-

ditions precedent contained in the "No Action" clause of the policy[1] are voided by the *Seider* rule.

Other illogical and impractical consequences of the *Seider* rule are discussed in the concurring opinion of Judge Breitel and the dissent of Judge Burke in *Simpson* v. *Loehmann,* Appendix "A", in the several Practice Commentaries in 7B McKinney's Civil Practice Law and Rules §5201 and in critical articles in periodicals, *e.g.,* Note, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Col. L. Rev. 550 1967); Willis L. M. Reese, The Expanding Scope of Jurisdiction Over Non-Residents—New York Goes Wild, Insurance Counsel Journal, January, 1968, p. 118; David D. Siegel, Simpson Upholds Seider—Problems For Both Sides, New York Law Journal, January 23-25, 1968, p. 1, col. 4.

The Questions Presented are Substantial

The constitutional questions posed by this appeal go to the very heart of jurisdictional due process and the role of the individual state in our federal system.

The *Seider*-type attachment has already been found to be an unconstitutional violation of due process in two unreported lower court cases decided since this case and *Simpson* v. *Loehmann—Podolsky* v. *Devinney,* —— F. Supp.—— (SDNY, 1968) and *Vaage* v. *Lewis,* —— AD2d ——, New York Law Journal March 27, 1968, p. 1, col. 1 (2nd Dept., 1968). Copies of the opinions in both cases are attached

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[1] "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

as Appendix "C". Even a cursory reading of the four opinions in *Simpson* v. *Loehmann* indicates that none of the judges really approve of the *Seider* attachment and that a majority would vote to overrule *Seider,* but for undue concern for "institutional stability" of the Court.

This appeal raises at least three serious due process problems. The first is whether the doctrine of *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945) extends to *quasi in rem* jurisdiction. When considered in the light of the expanded *in personam* jurisdiction available under modern "long arm" statutes, it is submitted that the *International Shoe* rule should so extend, particularly with respect to intangible debts of multistate corporations. See, Reese, The Expanding Scope of Jurisdiction Over Non-Residents—New York Goes Wild, *supra.* Applying the *International Shoe* rule that jurisdiction must be fair to the parties and reasonable in the context of our federal system to the present case, the result must be a finding that the attachment violates due process.

Due process is also concerned in determining the constitutionality of New York's interference with contractual property rights of the parties to the insurance contract. The contract was entered into outside of New York and New York has no real interest in either the contract or the cause of action. Despite this, New York has, by the attachment here, converted non-monetary, non-transferable, contingent promises into mature debts subject to arbitrary monetary valuation and completely negated other provisions, such as the "No Action" clause. Appellant submits that this results in an unconstitutional deprivation of the property of the insurer and the insured. *Home Insurance Co.* v. *Dick,* 281 U.S. 397 (1930).

Another significant due process consideration is the limit on the ability of a state to impose on an insurer a direct

liability for causes of action covered by liability insurance. As Judge Keating candidly admits in his concurring opinion in *Simpson*, the real intent of the Court of Appeals is to enact judicially a direct action statute in New York applicable to foreign causes of action involving foreign parties arising under foreign policies of insurance. It appears that in so doing New York has exceeded the due process limits set forth in *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). The burdens imposed upon the insurance industry by such direct action also raise a companion question as to its validity under the commerce clause of the United States Constitution, Article 1, §8 Cl. 3.

The constitutional issues at stake in the subject appeal are of grave importance not only to the insurance industry, but to the insuring public and to injured parties. While the issues remain open, the insurance companies are unable to determine their liabilities in the state of New York on foreign policies and causes of action and are faced with multiple claims and impending chaos when other states adopt the same device. The insurers are also faced with the prospect of entry of default judgments in those instances where the insureds refuse to submit to unlimited personal jurisdiction in New York. The insured is faced with the prospect of loss of insurance protection for lack of cooperation, if he does not agree to submit to personal jurisdiction in New York so as to allow a defense on the merits; and, if he does so agree, he faces the prospect of litigation in a foreign forum noted for its high verdicts, the attendant inconvenience to himself and his witnesses and the risk of a judgment exceeding the limits of his policy. These issues, therefore, should be resolved without delay to remove the uncertainty now existing.

CONCLUSION

The Court has jurisdiction of this appeal under 28 U.S.C. §1257(2).

Respectfully submitted,

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